SUPREME COURT, U.S.
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No. 02-

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IN THE

Supreme Court of the United States

HI-HEALTH SUPERMART CORPORATION,

Petitioner,

v.

JILL LANSDALE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does gender-related banter, unaccompanied by any touching, sexual overture, or discrimination in employment terms or opportunities, give rise to a "hostile working environment" for purposes of a sexual harassment claim under Title VII?

2. Does the existence of a hostile working environment present a question of law for the court, or solely a question of fact for the jury?

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Hi-Health Supermart Corporation, has no parent corporation and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Hi-Health Supermart Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals was divided between a published opinion and a jointly filed unpublished memorandum disposition. The opinion is published at 314 F.3d 355 (App. B at 8a), and the memorandum disposition is available at 54 Fed. Appx. 268, 2002 WL 31856113 (App. A at 1a). The decisions of the district court are unreported. (App. C at 15a; App. D at 45a.)

STATEMENT OF JURISDICTION

The court of appeals denied Hi-Health's petition for rehearing on February 21, 2003. (App. E at 61a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2000).

STATUTORY PROVISIONS INVOLVED

The statute relevant to the questions presented is section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a) (2000), which provides:

It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against

> any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT

1. Introduction and Summary

This case presents a factual paradigm that has worried this Court for at least five years. In decision after decision, the Court has reiterated that Title VII does not provide a cause of action for "'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (citation omitted); *see Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998). While the Court expressed that principle in cases of either egregious behavior or a single joke, it has yet to address a case involving repeated gender-based teasing that was not sexual, vulgar, amorous, haranguing, or accompanied by physical conduct or discrimination in employment terms or opportunities. This is precisely such a case. The Ninth Circuit has failed to apply Title VII consistently with this Court's statements, including the Court's most recent unanimous reversal of the Ninth Circuit's

own unpublished decision in *Clark County School District v. Breeden*, 532 U.S. 268, 270-71 (2001). Beyond that, the Ninth Circuit's decision exposes a fault line in the Title VII case law. The circuits are split both over the threshold level of conduct required for a "hostile environment" claim and over the role of the court in ensuring that jury verdicts satisfy that standard. This case provides a clean factual setting of mere gender-based teasing in which this Court can provide needed guidance.

Title VII is a source of constant litigation. The Ninth Circuit's decision lowers the bar by permitting people to sue based solely on gender-related jokes. At the same time, it highlights the conflict in the courts as to their role in preventing such unnecessary litigation. Moreover, it does so in an important factual context that this Court has not yet considered. It demonstrates the risk that Title VII will become what this Court has repeatedly admonished it must *not* become: a "general civility code" that punishes gender-related jokes or teasing, however annoying or unpleasant a particular plaintiff may find them.

The district court below upheld the jury's verdict for the plaintiff and its award of punitive damages while citing a lack of guidance from the Ninth Circuit. The Ninth Circuit affirmed the judgment without providing any guidance: rather, having ruled on the constitutionality of the statutory damages cap issue in a published opinion, the court relegated its ruling on the application of Title VII to an unpublished memorandum. Now it is up to this Court to provide the needed guidance. This case raises issues that cannot be swept under the judicial rug. They must be squarely confronted so that this Court can provide necessary guidance to the lower courts.

2. Background of the Case

Hi-Health Supermart Corporation is an Arizona-based company that owns about 50 retail stores in the Phoenix metropolitan area that sell health products, including groceries, food, books, and vitamins. Hi-Health was founded in the 1970s by Sy Chalpin, who remains the President and owner of the company. Chalpin is a short, elderly, gregarious New Yorker who typically uses his old-school brand of humor to motivate or inspire others.

While Chalpin is old-school in some ways, his company's employment policies are not. Hi-Health's workforce of over 300 is predominantly female, and, during the relevant period, most of Hi-Health's senior managers were women. Those managers included the warehouse manager, customer sales manager, training manager, human resources director, and plaintiff Jill Lansdale, who was the general merchandise manager. There is no evidence that Chalpin ever sought to limit or impair the performance of women in his company; to the contrary, he hired and promoted them, and encouraged their progress.

Chalpin personally interviewed and hired Lansdale in October 1996 to be Hi-Health's general merchandise manager. Though he had initially placed her in a six-month probationary period at a buyer's annual salary of $45,000, he promoted her several months early, and on December 1, 1996, she officially became general merchandise manager, with an annual salary of $80,000. (Trial Transcript ("Tr.") at 312, 314-15.) Lansdale worked in that position until June 1997, when she was terminated for performance-related reasons. The district court granted, and the court of appeals affirmed, summary judgment for Hi-Health on Lansdale's

claim of wrongful termination, and the circumstances of her discharge were not at issue in the trial of her Title VII claim.

The sum and substance of Lansdale's Title VII "hostile environment" claim is that Chalpin made gender-related remarks. She admitted that, while she worked for Hi-Health, she "*suffered no other form of gender discrimination . . . aside from the comments*." (Tr. at 312, emphasis added.) She did not allege that Chalpin ever discriminated against her or any other women in salary, benefits, responsibilities, or opportunities for advancement.

Chalpin's comments, which were listed by the district court in its order denying JMOL, may have been gender-related or sexist, but they were never more than banter. (App. C at 18a-20a.) The only specific circumstance Lansdale described was one occasion in November 1996 on which Chalpin commented to her and her acquaintance that "Hi-Health was a slow-moving company because they had a woman in charge of merchandising, which was myself." (*Id.* at 19a; Tr. at 243-44, 246, 316, 521-24.) Lansdale admitted that Chalpin "might have said it lightly," and "it crossed my mind he could have been kidding" or "joking." (Tr. at 247, 316, 317-18.) Indeed, it was well known even to Lansdale's acquaintance that the company was "growing fast," not "slow-moving," and Lansdale, who had been hired only the month before, was promoted to general merchandise manager (with a doubling of her salary) shortly after Chalpin made that comment. (*Id.* at 314-15, 431-32, 438.)

Lansdale claimed that Chalpin made other comments in a similar way. Chalpin purportedly urged her, "think with the logic of a man," and, "Forget you're a woman when you negotiate for Hi-Health." (*Id.* at 236, 330.) Lansdale also testified that Chalpin commented that "I was slow because I

was a woman," (*id.* at 246), that "women were slower than men" (*id.* at 252), and that "men were smarter than women." (*Id.* at 255.) Lansdale also testified that Chalpin *once* said to her, "That's a comment that only a woman would make." (*Id.* at 262.)

The other teasing comments by Chalpin that Lansdale alleged were even more innocuous. She testified that Chalpin had remarked that her widely-known diet appeared successful because she "was slimming up quite nicely," a compliment that Lansdale admitted was unaccompanied by any "demeaning behavior." (*Id.* at 271, 345, 346.) She testified that Chalpin *twice* made tame jokes about attractive women depicted in an advertisement or stock photograph. (*Id.* at 274, 348-50.) She claimed that he had once teased that "I got where I was because of my looks, or I got where I was because of my looks and my body." (*Id.* at 270.) On another occasion, when Lansdale had purportedly worked so hard over an Easter weekend that her husband was unhappy with her, Chalpin joked, "So are you telling me you're available now?" (*Id.* at 277.) Chalpin had never asked about her marriage on any other occasion, and Lansdale reported that when they were on overnight business trips, Chalpin behaved appropriately and did not "come on" to her in any way. (*Id.* at 352-53.)

The female witnesses who testified about Chalpin's periodic gender-related comments in the workplace testified that they *knew he was joking*. They corroborated Chalpin's testimony that his often-ironic sense of humor was not intended to be taken personally or maliciously.[1] There was

1. (*See* Tr. at 652, 657, 668, 686-87 (Christine Dworkin); *id.* at 760, 762-63, 787-88 (Carol Norwalk); *id.* at 884, 891, 893 (Brenda Nitchen); *id.* at 1241-44 (Kory Shaw); *id.* at 1393 (Donna Rider); *id.* at 1411 (Mary Ann Dougherty).)

no yelling or "physically threatening or humiliating" behavior, but rather at most "a mere offensive utterance." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). The jury was allowed to hear that Chalpin had, on occasion, commented about "women drivers" and made "blonde jokes."

There was no evidence that Chalpin's attempts at humor, however clumsy, interfered with his female employees' job performance. Lansdale herself repeatedly testified in her deposition and at trial that Chalpin's remarks did not unreasonably interfere with her performance which, in her view, remained at a "very high level." (9th Cir. Supp. Excerpts of Record 47, ¶ 42; Tr. at 357-58.) Moreover, Hi-Health buyer Christine Dworkin testified that, in 1996 and 1997, when she worked closely with Chalpin and Lansdale, they appeared to relate "cordially" and "professionally" with one another. (Tr. at 688-89.) And buyer Carol Norwalk testified that "in meetings, [Lansdale] and [Chalpin] had some good conversations where I felt he respected her." (*Id.* at 776.)

In sum, Chalpin's remarks were not vulgar, profane, or graphic. They were not made in a threatening or even haranguing manner. There were no sexual or amorous overtures. There was no improper touching, crowding, or other physical acts. Lansdale never suggested that Chalpin was trying to be hostile, to drive her or women in general from the workforce, to interfere with her job performance, or to inflict emotional distress. Chalpin's arguable transgression was that sometimes Lansdale did not find his comments as funny or endearingly old-fashioned as he intended.

Before sending the case to the jury, the district court denied Hi-Health's motion for summary judgment, though

the court found that "it does not appear that the offensive conduct occurred daily or even weekly." (App. D at 55a.) Lansdale did not herself quantify the number of occasions on which she heard gender-related comments. Other female employees testified, for example, that they only *once* heard Chalpin refer to men being smarter than women (Tr. at 762, 931), or *once* heard him use "broad" to refer to a woman (*id.* at 684, 827).

3. Proceedings Below

a. District Court

Lansdale's Title VII claim was tried to a jury in the district court, and the jury returned a verdict of $100,000 in compensatory damages and $1 million in punitive damages. In its post-trial order, the district court conformed the verdict to the $200,000 statutory damages cap under Title VII for an employer the size of Hi-Health.

As to liability, the court observed that "[t]he evidence adduced at trial in this case is on the borderline of culpable conduct under Title VII." However, the trial court declined to grant judgment as a matter of law "in the absence of more explicit guidance from the Ninth Circuit. . . ." (App. C at 21a.) Indeed, in its earlier ruling on summary judgment, the district court found that Chalpin's "remarks, taken individually, cannot be said to reasonably constitute harassment or to create a hostile environment." (App. D at 54a.)

b. Court of Appeals

On Lansdale's appeal and Hi-Health's cross-appeal from the amended judgment, the Ninth Circuit affirmed in two separate but jointly filed decisions, one published and one

unpublished. In the published opinion, the court upheld the constitutionality of the statutory damages cap. (App. B.) The court addressed whether Hi-Health had violated Title VII in the unpublished memorandum, despite the district court's plea for guidance on that issue. The court briefly stated that

> the jury could, indeed, determine that Chalpin's repeated statements were severe and pervasive enough to alter the conditions of Lansdale's employment and render the environment hostile and abusive. Certainly a jury could decide that a reasonable woman would find it so. Lansdale did.

(App. A at 2a-3a, citations and footnote omitted.)

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit Has Failed to Confine Title VII to the Bounds Set by this Court's Decisions.

This case illustrates how far astray a court of appeals may go from the original goals of Title VII. In the absence of discriminatory employment actions, physical touching, sexual propositions, or threatening behavior, the Ninth Circuit found a violation of Title VII based on mere speech. Indeed, it based its judgment on speech that was not vulgar or even intended as hostile, even if the humor embodied in it was dated and offensive.

The text of Title VII itself sets no specific standard for hostile environment cases; the doctrine is judge-made. The statute only generally bars an employer from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of

employment." 42 U.S.C. § 2000e-2(a)(1) (2000). By two key decisions, the Court unmoored sexual harassment law from two anchors: money and tangible psychological effect on the plaintiff. In 1986, the Court held that Title VII forbids not only quid pro quo harassment, but also "hostile environment" harassment that does not affect the plaintiff's economic benefits. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986). Then, in 1993, the Court held that, to be actionable, the hostile environment need not "seriously affect [an employee's] psychological well-being" or lead her to "'suffer injury,'" *e.g.*, cause "a nervous breakdown" or other "concrete psychological harm." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (citation omitted). Instead, the environment need only be one that the plaintiff subjectively perceived as "abusive" and that an objective reasonable person would also find hostile and abusive. *Id.* at 21-22.

It soon became clear that Title VII might drift into becoming a workplace civility code, spurring more litigation over frivolous complaints or minor grievances and "further complicat[ing] a workplace already confused about male-female relations."[2] This Court took steps to keep the statute in check, but its opportunities to do so came in cases that involved either multiple egregious acts of overtly sexual conduct or, by contrast, a single naughty joke. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), involved same-sex harassment that included sexual assault, battery, and threats of rape. The Court admonished that lower courts must "distinguish between simple teasing . . . and conduct which a reasonable person . . . would find severely hostile or abusive." *Id.* at 81-82. That same year, *Faragher*

2. Robert Sherefkin, *Sexual Harassment Ruling Creates More Uncertainty*, Crain's Det. Bus., Sept. 7, 1998, at 12.

v. City of Boca Raton, 524 U.S. 775 (1998), involved repeated and uninvited offensive touching, threatening sexual requests, and sexual comments and gestures to a female lifeguard by two male superiors. The Court cautioned against allowing Title VII to become a "general civility code," and emphasized the need to "filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.'" *Id.* at 788 (citations omitted). The Court reiterated, "We have made it clear that conduct must be *extreme* to amount to a change in the terms and conditions of employment. . . ." *Id.* (emphasis added).

Then, in *Clark County School District v. Breeden*, 532 U.S. 268 (2001), this Court unanimously reversed the Ninth Circuit's unpublished decision reinstating a Title VII hostile environment suit based on a single joke by colleagues: in reviewing job applications, a male supervisor read out loud a sexual comment the job-seeker had once made to a co-worker, and remarked that he did not know what the comment meant. The other male employee replied, "Well, I'll tell you later," and the two men chuckled. *Id.* at 269. The Court admonished that, "[j]ust three Terms ago, we reiterated, what was plain from our previous decisions, that sexual harassment is actionable under Title VII only if it is 'so "severe or pervasive" as to "alter the conditions of [the victim's] employment and create an abusive working environment."'" *Id.* at 270 (citations omitted). As this Court explained, "'a recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment."'" *Id.* at 271 (quoting *Faragher*, 532 U.S. at 788). The Court reaffirmed that "'whether an environment

is sufficiently hostile or abusive' must be judged 'by "looking at all the circumstances," including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."'" *Id.* (quotations omitted).

Despite the admonitions from this Court, the Ninth Circuit has returned to its view that gender-related jokes are sufficient to create a hostile working environment. While the impact of this Court's *Clark County* decision was fully briefed below, the Ninth Circuit did not cite it in its ruling on the sexual harassment claim.[3] The court of appeals' principle seems to be that even though the single joke in *Clark County* was not enough, several of them over a period of almost a year were sufficient to state a claim. The panel clearly did not abide by this Court's repeated statements that gender-related banter does not violate Title VII. The conduct alleged in this case is far afield from the paradigm of discrimination based on sex in "compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1), and this Court should once again illuminate the proper bounds of the statute's proscriptions.

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3. The court of appeals cited *Clark County* only for an unrelated proposition related to causation in affirming summary judgment for Hi-Health on Lansdale's retaliatory discharge claim. (App. A at 5a.)

II. The Circuits Are in Conflict As to the Whether the Conduct at Issue Can Give Rise to a Hostile Working Environment.

A. The Circuits Are Split on Whether There is a "Safe Harbor" for Gender-Related Teasing.

The courts of appeals are divided on the critical issue raised by this case: whether gender-relating teasing can create a hostile environment that constitutes sexual harassment under Title VII. "[T]here are differing views among the circuits about what constitutes a hostile work environment." *Smith v. N.W. Fin. Acceptance, Inc.*, 129 F.3d 1408, 1415 n.3 (10th Cir. 1997). As Professor Eric Schnapper has noted, the courts are "sharply divided" on the distinction between "mere offensive utterances" and discriminatory sexual harassment, with the Fourth, Fifth, Sixth, and Seventh Circuits adopting a more constrained view of "hostile environment" claims in "stark contrast" to that of the Ninth and other circuits.[4] As a result, "harassment patterns and tactics that are clearly unlawful in much of the country are practically immune from attack" in other circuits. *Id.* at 282. A district court recently granted summary judgment for the employer on a hostile environment claim based on a lengthy "laundry list" of sexist and sexual comments and physical touching, but noted that, "[a]dmittedly, this case might make the grade in some jurisdictions." *Breda v. Wolf Camera, Inc.*, 148 F. Supp. 2d 1371, 1379, 1381 (S.D. Ga. 2001). This is intolerable for a statute of national application that applies in each and every place of employment across the country.

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4. Eric Schnapper, *Some of Them Still Don't Get It: Hostile Work Environment Litigation in the Lower Courts*, 1999 U. Chi. Legal F. 277, 281-82, 309.

Some circuits have "created a safe harbor for employers in cases in which the alleged harassing conduct is too tepid or intermittent or equivocal to make a reasonable person believe that she has been discriminated against on the basis of her sex." *Galloway v. Gen. Motors Serv. Parts Operations*, 78 F.3d 1164, 1168 (7th Cir. 1996) (Posner, J.). Under this view, "[p]ractices which do not reach the requisite 'level of offensiveness' . . . cannot as a matter of law provide a basis for a Title VII claim . . . regardless of how often they occur." Schnapper, *supra*, at 310. The typical elements of the paradigmatic case of sexual harassment are "sexual assaults . . . uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures," *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995), and a claim that is "far from the paradigmatic case of sexual harassment" is not actionable. *Hartsell v. Duplex Prods., Inc.*, 123 F.3d 766, 773 (4th Cir. 1997).

The seminal decision for this view is *Baskerville*, in which the Seventh Circuit overturned a jury verdict based on a hostile environment claim where the alleged harasser had made a gesture "intended to suggest masturbation," made a grunting sound that sounded like "um um um" when the plaintiff walked by, commented that it got "hot" when she entered his office, and told her that one company announcement meant "[a]ll pretty girls run around naked"—conduct far more egregious than occurred in this case. 50 F.3d at 430-31. Writing for the court, Judge Posner noted that the alleged perpetrator was not a "sexual harasser," but merely "a man whose sense of humor took final shape in adolescence." *Id.* at 431.

> It is no doubt distasteful to a sensitive woman to have such a silly man as one's boss, but only a woman of Victorian delicacy—a woman

> mysteriously aloof from contemporary American popular culture in all its sex-saturated vulgarity—would find [the supervisor's] patter substantially more distressing than the heat and cigarette smoke of which the plaintiff does not complain.

Id. at 432.

"The central teaching of the *Baskerville* opinion [is] that 'low-level harassment' is not actionable." *Gleason v. Mesirow Fin., Inc.*, 118 F.3d 1134, 1144 (7th Cir. 1997) (Coffey, J.). Instead, "[t]he concept of sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish for women," and requires a distinction between "a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other." *Baskerville*, 50 F.3d at 430, 431.[5] Several appellate courts have warned against decisions that "lower the bar of Title VII to punish mere bothersome and uncomfortable conduct," which "would 'trivialize true instances of sexual harassment.'" *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 586 (11th Cir. 2000).[6]

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5. *See also Duncan v. Gen. Motors Corp.*, 300 F.3d 928, 934-35 (8th Cir. 2002) (recognizing that "the high threshold of actionable harm" is not met by conduct that was merely "boorish, chauvinistic and decidedly immature"); *Penry v. Fed. Home Loan Bank*, 155 F.3d 1257, 1263 (10th Cir. 1998) (though "plaintiffs worked in an unpleasant environment," it was not "permeated with discriminatory intimidation"); *Hartsell v. Duplex Prods., Inc.*, 123 F.3d 766, 773 (4th Cir. 1997) ("allowing [plaintiff's] claim to go to trial would countenance a federal cause of action for mere unpleasantness").

6. *See also Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 790 (6th Cir. 2000) (county engineer's repeated dirty jokes, (Cont'd)

Other circuits have followed this safe harbor view in cases of "gender slur" as well as "sexual innuendo." *Galloway*, 78 F.3d at 1168. The Fifth Circuit's decision in *DeAngelis v. El Paso Municipal Police Officers Association*, 51 F.3d 591, 593 (5th Cir. 1995), demonstrates the patent conflict with the Ninth Circuit's standard in this case. In *DeAngelis*, the Fifth Circuit reversed a judgment for a female police officer who claimed that repeated columns in a police officer association newsletter over thirty months satirized the plaintiff, the first female sergeant in the El Paso force, and created a hostile environment. The columns made fun of women being in the workplace, referring to the plaintiff as a "dingy woman," recalling "the good ol' days when finding the criminal was more important to the patrolmen than keeping your hair in place," and expressing a desire for "a female officer that places her ability before her gender." *Id.* at 594-95. Writing for a unanimous panel, Judge Edith Jones held that the columns did not create a hostile environment because they "did not represent a boss's demeaning harangue, or a sexually charged invitation, or a campaign of vulgarity perpetuated by co-workers." *Id.* at 595. To the contrary, the columns "attempted clumsy, earthy humor," and their author "intended to be a curmudgeon, the police department's Archie Bunker or Homer Simpson," and "[m]isogyny naturally came with [his] territory." *Id.* The court noted that "much of his humor lacked volatility" and "hardly rank in the firmament of sexist vilification." *Id.*[7]

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verbal sexual advance, reference to plaintiff as "Hot Lips," and comments about her state of dress "seems to have consisted of the kind of simple teasing, offhand comments, and isolated incidents that *Faragher* made clear did not amount to discriminatory changes in the terms and conditions of a plaintiff's employment").

7. *See also Buckner v. Gen. Signal Tech. Corp.*, 163 F. Supp. (Cont'd)

The Fifth Circuit's standard echoes that of the Seventh Circuit. "A claim for a sexually hostile working environment is not a trivial matter," and "embodies . . . conduct so egregious as to . . . destroy [women's] equal opportunity in the workplace. . . . [A] less onerous standard of liability would attempt to insulate women from everyday insults as if they remained models of Victorian reticence" and "would mandate not equality but preference for women." *Id.* at 593; *see also Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191, 194 (5th Cir. 1996) (Title VII does not apply to "everyday insults," or to the type of harassment which "does not hinder a female employee's performance").

The Ninth Circuit's decision below indicates the circuit's continuing adherence to a more expansive view of Title VII that recognizes no "safe harbor" for workplace teasing or humor, however gender-related, and that produced the memorandum decision that this Court reversed in *Clark County*. Nor is the Ninth Circuit alone. In *Gallagher v. Delaney*, the Second Circuit held that frequent gifts, compliments, and lunch invitations were sufficient to give rise to a Title VII claim, even without any off-color remarks. 139 F.3d 338, 343-44 (2d Cir. 1998). These circuits do not require "hellish" circumstances that interfere with the

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2d 617, 624 (W.D.N.C. 2000) (granting summary judgment to employer because "[c]ertainly, sexist banter which the recipient did not know whether to take seriously was not 'severe,'" even though "it reflected an archaic attitude . . . indicative of a person who is out of touch with social and legal norms"); *Forrest v. Dynamic Sec. Corp.*, 2002 WL 1204917, at *12 (E.D. La. May 2, 2002) (granting JMOL to employer because "a few jokes [by a higher-level supervisor] that were derogatory towards women . . . is insufficient as a matter of law to show the existence of a hostile work environment").

plaintiff's job performance, but only that the altered conditions created by the harassment be disadvantageous to the plaintiff in some sense.[8]

B. The Circuits Are Divided on the Underlying Purpose of Title VII.

The circuit split on the standard for hostile conduct reflects an underlying conflict on the purpose of Title VII. *See* Schnapper, *supra*, at 293-94 (citing cases). For example, the Seventh Circuit has noted that Title VII was not intended to address all sexist conduct, because "vulgar banter, tinged with sexual innuendo is inevitable in the modern workplace, particularly from 'coarse and boorish workers.'" *Gleason*, 118 F.3d at 1144 (citation omitted).

By contrast, the decision of the Ninth Circuit panel below (which including a visiting Third Circuit judge) reflected a more activist agenda that both of those circuits have endorsed:

> Congress did not enact Title VII to codify prevailing sexist prejudices. To the contrary, "Congress designed Title VII to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage

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8. *Hathaway v. Runyon*, 132 F.3d 1214, 1222 (8th Cir. 1997); *Stacks v. S.W. Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1327 (8th Cir. 1994); *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1410 (10th Cir. 1997) (race discrimination case); *Mendoza v. Borden, Inc.*, 158 F.3d 1171, 1175 (11th Cir. 1998), *rev'd on other grounds*, 195 F.3d 1238 (11th Cir. 1999) (en banc); *King v. Hillen*, 21 F.3d 1572, 1583 (Fed. Cir. 1994); *Knabe v. Boury Corp.*, 114 F.3d 407, 410 (3d Cir. 1997); *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081 (3d Cir. 1996).

> employment opportunities for women." . . . We hope that over time both men and women will learn what conduct offends reasonable members of the other sex. When employers and employees internalize the standard of workplace conduct we establish today, the current gap in perception between the sexes will be bridged.

Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991) (quoting *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990)). The Ninth Circuit panel below expressly relied on *Ellison*. (App. A at 3a n.2.)

These contrary perspectives on the goal of the statute produce disparate results when the conduct at issue is less than egregious and more than one isolated, tame joke. As one court recently observed, "[a]ll of the sexual hostile environment cases decided by the Supreme Court have involved patterns or allegations of extensive, longlasting, unredressed, and uninhibited sexual threats or conduct that permeated the plaintiffs' work environment." *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 264 (5th Cir. 1999). That is why this case offers an important factual setting closer to the "borderline" in which to establish the limits of Title VII.

This is a critical conflict for the Court to resolve. The development of Title VII case law has left an "expansive wasteland between actionable harassment and merely unpleasant teasing."[9] "'Severe,' 'pervasive,' 'hostile,' and

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9. Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 Notre Dame L. Rev. 437, 491 (2002).

'abusive' are mushy terms,"[10] and determining the intensity or quantity of conduct needed to constitute a hostile environment "is now no less difficult than 'trying to nail a jellyfish to the wall.'" *Breda v. Wolf Camera, Inc.*, 148 F. Supp. 2d 1371, 1377 (S.D. Ga. 2001) (quotation omitted). This is a particularly difficult problem where the alleged remarks would not violate Title VII if made once or twice, but the plaintiff asserts that they were made with sufficient frequency to create a hostile environment. "'[I]t is often impossible for a supervisor or employer to know in advance whether or not offensive conduct is illegal, because of the amorphousness of the legal definitions of harassment itself.'"[11] The ineluctable result of this state of affairs is overcorrection of lawful speech and behavior: "The employer's natural response, given that he does not even know exactly what the terms [of the legal test] mean, is to avoid possible liability, and will likely cause him to 'shut the employees up,'" thus suppressing protected speech.[12]

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10. Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 Geo. L.J. 627, 634 (1997).

11. Frank, *supra*, at 491 (quoting Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* 82-83 (2000)).

12. Roy Whitehead, Jr. & Walter Block, *Sexual Harassment in the Workplace: A Property Rights Perspective*, 4 J.L. & Fam. Stud. 229, 236 (2002). "Vagueness leads people 'to "steer far wider of the unlawful zone," than if the boundaries of the forbidden areas were clearly marked.'" Volokh, *supra*, at 636 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)). *See also* Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. Rev. 1791, 1802 n.54 (1992); *Men, Women, Work and Law: An Even More Dangerous Mixture than Before, Thanks to the Supreme Court*, Economist, July

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Whether jokes or stray comments about gender can, standing alone, be considered unlawful is a matter that lawyers and nonlawyers alike have long debated, whether in courtrooms, boardrooms, or living rooms. This Court addressed the "one joke" setting in *Clark County*, and repeated sexual or threatening behavior in other cases. This case presents an intermediate context of repeated but nonsexual and nonthreatening comments devoid of any alleged touching, amorous overtures, or discriminatory employment actions. It is therefore provides an excellent vehicle for resolving the differing views as to Title VII's application to what is common workplace behavior. Without this Court's intercession, Title VII's standards will remain intolerably vague and and will continue to have a confusing and polarizing effect on ordinary social interaction.

III. The Circuits Are in Conflict as to Whether the Existence of a Hostile Environment Is a Question of Law or Fact.

The Ninth Circuit's decision upholding the jury verdict raises a second conflict among the circuits: whether the existence of a hostile working environment is a question of fact, a question of law, or some combination of the two.

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4, 1998, at 12, 21 (Title VII had "already forced employers to engage in mass censorship of employee speech," and decisions "may create more rather than less confusion" and "put even more pressure on them to do this"); John O. McGinnis, *Don't Call High Court Conservative*, Newsday, July 27, 1998, at A27 (expansive application of Title VII will "impose costs on businesses and social rigidities on everyone else" because, "[i]n order to avoid lawsuits, companies . . . will react by creating inflexible, overbroad codes that are likely to chill much social behavior that does not constitute harassment.").

Courts and commentators have noted the circuit conflict on this issue. *See, e.g.*, *Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710, 716 n.1 (3d Cir. 1997) ("the courts of appeals are divided"); Schnapper, *supra*, at 298 (noting "a clear division among the circuits"). The conflict on this point is crucial: it determines whether and to what extent the court will restrain juries from overrunning the proper bounds of Title VII by granting JMOL.

On one hand, some circuits view the issue as essentially factual, requiring extreme deference to the jury and review for clear error.[13] The Eighth Circuit has opined, "There is no bright line between sexual harassment and merely unpleasant conduct so a jury's decision must generally stand unless there is trial error." *Hathaway v. Runyon*, 132 F.3d 1214, 1221 (8th Cir. 1997). This validates the prediction that Title VII case law would leave "virtually unguided juries [to] decide whether sex-related conduct . . . is egregious enough to warrant an award of damages." *Harris*, 510 U.S. at 24 (Scalia, J., concurring).

On the other hand, "[o]ther circuits take an entirely different approach" and rely on "judge-made determinations of whether or not . . . a given set of circumstances create a hostile work environment." Schnapper, *supra*, at 301

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13. *See, e.g.*, *Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998) ("A federal judge is not in the best position to define the current sexual tenor of American cultures in their many manifestations."); *Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1130-31 (4th Cir. 1995) ("Whether harassment is sufficiently severe or pervasive to create an abusive work environment is 'quintessentially a question of fact.'") (citations omitted); *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830, 835-36 (6th Cir. 1996) (same; quoting *Amirmokri*).

(collecting citations).[14] These circuits recognize that a defendant's failure to pay proper homage to appropriate social mores and political correctness can easily result in an aroused jury refusing to distinguish between the dictates of good manners and the requirements of law, and that "[m]otions for judgment as a matter of law can police the baseline for hostile environment claims." *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 264 n.8 (5th Cir. 1999).

Thus, other circuits have deemed it appropriate to overturn jury verdicts and grant JMOL to the defendant where the misconduct did not rise to the level of a Title VII violation, even though it was far more egregious than Chalpin's gender teasing. *See, e.g.*, *Duncan v. Gen. Motors Corp.*, 300 F.3d 928 (8th Cir. 2002) (overturning jury verdict for female employee who was subjected to inappropriate behavior by a supervisor, including crude, rude, and lewd jokes and teasing, as well as overtures and unwanted touching); *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 579 (11th Cir. 2000) (overturning verdict and entering JMOL where purported harasser improperly touched plaintiff on knee and thigh, lifted the hem of her dress, and told her "You are looking very beautiful" and that he would have spent the night with her during a storm); *Mendoza v. Borden, Inc.*, 195 F.3d 1238,

14. *See, e.g.*, *Hardin v. S.C. Johnson & Son, Inc.*, 167 F.3d 340, 345 (7th Cir. 1999) ("Whether such [a hostile] environment exists is a question of law."); *see also Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 966 (9th Cir. 2002) ("[W]hether the plaintiff has established that she or he was subjected to a hostile work environment . . . present[s] mixed questions of law and fact that we review de novo.") (citations omitted); *Barbour v. Browner*, 181 F.3d 1342, 1348 (D.C. Cir. 1999) ("Whether the harassment in a particular case can be considered 'severe or pervasive' is manifestly a mixed question of law and fact[.]")

1243 (11th Cir. 1999) (en banc) (affirming JMOL for defendant where harasser looked plaintiff up and down, followed her, said he was "getting fired up," and rubbed his hip against hers); *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 826 (6th Cir. 1997) (vacating plaintiff's jury verdict where, for example, over a four-month period, the alleged harasser looked plaintiff up and down, and made sexual jokes); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995) (reversing plaintiff's jury verdict and entering JMOL for employer where supervisor's conduct included masturbation gestures, grunting at women, and suggesting that "pretty girls" should "run around naked").[15] The panel's decision cannot be squared with this precedent.

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15. Other courts have also approved summary judgment or dismissal to bring an end to cases that fall below the Title VII threshold. *E.g.*, *Alagna v. Smithville R-II Sch. Dist.*, 324 F.3d 975, 980 (8th Cir. 2003) (affirming summary judgment because coworker's repeated profession of love and other conduct were not indicative of "a sexual predator" and, "however inappropriate, [were] not sufficiently severe or pervasive to satisfy the high threshold for actionable harm"); *Rogers v. City of Chicago*, 320 F.3d 748, 753 (7th Cir. 2003) (affirming summary judgment because police sergeant's sexual jokes about plaintiff's breasts and her need for a boyfriend and other conduct were insufficient to create a hostile environment); *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 463 (6th Cir. 2000) (affirming dismissal of employee's claim where supervisor touched and grabbed the plaintiff several times (both sexually and non-sexually) and often made advances); *Shepherd v. Comptroller of Pub. Accounts*, 168 F.3d 871, 874-75 (5th Cir. 1999) (affirming summary judgment because each of coworker's sexual comments was "the equivalent of a mere utterance of an epithet than engender[s] offensive feelings" and none of actions "physically threatened" plaintiff or "undermine[d] Shepherd's workplace competence"); *Minor v. Ivy Tech State Coll.*, 174 F.3d 855, 857 (7th Cir. 1999) (affirming summary judgment for employer where

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In this case, the district court declined to grant JMOL to Hi-Health "in the absence of more explicit guidance from the Ninth Circuit, and in light of the highly fact-specific inquiry at issue." (App. C at 21a.) The Ninth Circuit provided no guidance at all, other than to emphasize the right of the jury to find that Chalpin's statements were severe and pervasive enough. (App. A at 2a-3a.) Though the Ninth Circuit had previously held (in reversing the district court's decision in favor of a *defendant*) that "whether the conduct . . . was sufficiently severe and pervasive to constitute sexual harassment is a question of law,"[16] the panel's failure to give any *legal* analysis in response to the district court's request for guidance, and its summary emphasis on the jury's right to find a hostile environment, puts it squarely with those circuits who follow the question-of-fact approach because of the "'fact-intensive' nature of the determination of whether a work environment is hostile." *Bales v. Wal-Mart Stores, Inc.*, 143 F.3d 1103, 1109 (8th Cir. 1998). This Court must bring uniformity to the circuits by clarifying the proper roles of judge and jury in determining whether a hostile environment existed.

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supervisor flirted with plaintiff, put his arms around her, and kissed and squeezed her); *Hartsell v. Duplex Prods., Inc.*, 123 F.3d 766, 772-73 (4th Cir. 1997) (affirming summary judgment despite comment by supervisor that he had "made every female in this office cry like a baby," statement that plaintiff was one of the "little people" or a "slave," and demeaning and insulting gender-related jokes and comments that were standard in the office).

16. *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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